UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BLISS CLEARING NIAGARA, INC. Case Nos. 7-CA-47816
7-CA-48571

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

A. Bradley Howell and Steven Carlson, Esqs.,
for the General Counsel.
Robert W. Sikkel and Keith J. Brodie, Esqs.
(Barnes & Thornburg, LLP) Grand Rapids, Michigan,
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN Administrative Law Judge. This case was tried in Grand Rapids, Michigan on April 25-29, July 18-22, and September 13, 2005. The charge in case 7-CA-47816 was filed August 25, 2004 and the complaint was issued on October 29, 2004. The charge in case 7-CA-48571 was filed on May 17, 2005 and the complaint was issued on June 17, 2005. The cases were consolidated on July 11, 2005.

The General Counsel alleges that Respondent, Bliss Clearing Niagara, Inc. (BCN), through its agent, Supervisor Daniel Gilbert, violated Section 8(a)(1) in informing an employee that Respondent was changing its operations at Hastings, Michigan because employees elected the Charging Party, the International Association of Machinists and Aerospace Workers (IAM), to represent them on May 21, 2004.

Further, the General Counsel alleges that in mid-2004, Respondent, violated Sections 8(a)(3) and (5) of the Act by canceling plans to bring machinery and equipment from a facility in Buffalo, New York to its Hastings, Michigan facility, increasing the amount of work outsourced from its Hastings facility and ceasing to repair machinery at its Hastings facility. Additionally, he alleges that Respondent violated these sections of the Act by laying off 18 of its 43 manufacturing, assembly and maintenance employees on August 30, 2004, and limiting these employees' recall rights to 90 days from the date of the lay-off. [1]

The General Counsel also alleges that in early 2005, Respondent violated Sections 8(a)(3) and (5) by changing the qualifications for the bargaining unit position of quality inspector,

[1] Respondent laid-off 15 of it 25 machine shop employees, one of seven assembly room employees, one of three maintenance employees and one of three stockroom employees. The General Counsel alleges that not only did the decision to have a lay-off violate the Act, but the manner and results of the selection process for lay-off was also violative.

failing and refusing to consider former employee Eric Hutchings for those positions and failing to recall Eric Hutchings, who was one of the employees laid off in August 2004.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Bliss Clearing Niagara, Inc., a corporation, rebuilds and services industrial metal forming presses, and manufactures replacement parts for these presses at its facility in Hastings, Michigan, where it annually receives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 from points outside of the State of Michigan. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the International Association of Machinists and Aerospace Workers (IAM), District Lodge 97, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's background

The E.W. Bliss Company manufactured industrial metal forming presses in Hastings, Michigan for many years. In 1996, Bliss merged with two other press manufacturers, Clearing and Niagara, to form CNB International. CNB operated plants in Hastings and Buffalo, New York. In 1999 CNB filed for bankruptcy. As part of a bankruptcy reorganization, a new entity, Respondent Bliss Clearing Niagara, Inc. (BCN), commenced operations at the Hastings facility in May 2001. The Buffalo plant remained in the bankruptcy estate of CNB and all production work at that facility was outsourced.

BCN is a wholly owned subsidiary of the CIT Group, a commercial finance company that was CNB's principal creditor. Unlike its predecessors, BCN decided not to manufacture new presses, but to concentrate solely on the production of after-market (replacement) parts, and the reconditioning and rebuilding of existing presses.

As the result of its decision not to manufacture new presses, BCN implemented a series of lay-offs in the last half of 2001.That year it laid off 69 employees, including 29 from the machine shop and ten from the assembly area. In September-October 2002, Respondent laid off 4 machine shop employees. In September 2003, BCN laid-off three to five machine shop employees, but recalled three 90 days later, in December.[2] In none of the prior lay-offs did Respondent inform employees that it had a policy that limited employees' recall rights to a 90-day period, as it did on August 30, 2004. Moreover, there is no evidence that such a policy existed prior to August 30, 2004. So far as this record shows, employees were recalled in 2003

[2] There is a discrepancy between exhibit G.C. – 43 (e) and exhibit R-1 regarding the number of machinists laid off in September 2003. The former indicates five were laid off, including Mark Jensen, Loren Cowham and David Hurtado, who were laid off again in August 2004. R-1 indicates that three machinists, one inspector and one assembly room employee were laid off. It may be the two additional employees listed on G.C. - 43(e), as belonging to the machine shop, included the inspector and assembly room worker.

90 days after their lay-off because that is when economic conditions warranted their recall. Indeed, in September 2003 Jeff Gillesse told the employees being laid-off that if sales recovered "they would be given the first opportunity to be called back, but there was (sic) no dates indicated" (Tr. 306).

BCN's Chief Executive Officer from May 2001 until February 29, 2005 was Ben Landriscina, who was also an Executive Vice President and Chief Asset Recovery Officer of CIT. Landriscina closely monitored BCN's operations from New York City and visited the Hastings plant monthly. CIT's top representative at Hastings from May 2001 until April 2005, was Karen Adams, a CIT Vice-President and liaison officer to BCN. Adams spent four days a week at the Hastings facility and one day a week at the former CNB industrial power press facility in Buffalo, New York. Fred Stowell was the Chief Operating Officer at the Hastings plant until May 2003, when his duties were assumed by Jeffrey Gillesse, the Chief Financial Officer. During the period relevant to the instant case, Landriscina, Adams and Gillesse were intimately involved in the day to day operations of BCN, with Landriscina exercising ultimate authority with respect to every significant decision.

The previous unfair labor practice proceeding

On February 28, 2005, the Board issued its Decision and Order affirming the rulings, findings and conclusions, and adopting the recommended order of Administrative Law Judge Paul Buxbaum in Cases 7-CA-46528 et. al, *Bliss Clearing Niagara, Inc.,* 344 NLRB No. 26. The Board's findings and conclusions in this prior case are established facts in the instant case, *Great Lakes Chemical Corp.,* 300 NLRB 1024 (1990). [3]

The Board found as follows: on May 3, 2003, press operator Michael Shapley contacted the Union. On May 28, prior to the start of his shift, Shapley began gathering information for an organizing campaign amongst the Hastings plant employees. Press operator Duane Schantz was one of several employees who provided Shapley with such information. A number of management officials became aware of the organizing activity within a few hours. Stephen Wales, then BCN's manufacturing manager, informed Karen Adams and Fred Stowell, then BCN's Chief Operating Officer, about the union activity. Later the same day, Stowell told Wales that he had spoken to Ben Landriscina in New York and that, "Ben had told him that he wanted those individuals fired immediately" and that "Ben was really adamant and he said he will not have a union in the shop at Bliss," 344 NLRB No. 26 at slip opinion pages 3-5 and note 9. Still later on the same day, Respondent fired Shapley and Schantz because they participated in union activities, *Id., at pages 5, 16-17 and 24*, *conclusion of law number 1.*

On Sunday June 29, 2003, the Union held a meeting for BCN employees. Respondent's Assembly Room Supervisor, Daniel Gilbert, interrogated employees about the meeting the following Monday morning. After interrogating employee Doug Edinger, Gilbert said, "Ben [Landriscina] will close this place…[i]f the union came in," *Id., slip opinion at 5-6, 23*.[4]

---

[3] In *Great Lakes Chemical,* the Board found that the Respondent was estopped from relitigating the issue of successorship due to the Board's adoption of the Judge's findings in *Great Lakes Chemical Corp.,* 298 NLRB 615 (1990) and granted the General Counsel's motion for summary judgment. Also see *Stark Electric, Inc.,* 327 NLRB 518 n. 1 (1999).

[4] Judge Buxbaum credited Edinger's testimony over Gilbert's denial. The Board, in affirming Judge Buxbaum, also found that Gilbert harassed William "Larry" Moran, one of the alleged discriminatees in the instant case, and that Respondent deprived Moran of the opportunity to work an additional shift due to his participation in proceedings before the National Labor

Continued

Relevant Events in the spring of 2004

The Union suspended its efforts to organize BCN in 2003. In March 2004 organizing activity resumed. Respondent first became aware of the resumption of union activity on March 23, 2004, when the Union filed a representation petition.

Several weeks earlier, on March 1, 2004, Respondent sent John Hetherington, then a maintenance leadman, to the CNB facility in Buffalo, New York to determine whether any tools and machinery at that plant could be used at the Hastings plant. Hetherington's trip was approved by all levels of BCN management up to and including Ben Landriscina. The CNB facility was no longer in operation and some of its equipment had been sold at an auction in October 2003. However, there were tools and a number of machines that had not been sold.

Hetherington collected some tools at the Buffalo facility which BCN transported by truck back to Hastings. He also identified a number of machines that he believed could be used at the Hastings plant. These included: a Gould and Eberhardt (G & H) gear cutter, a G & H gear hobber, a Sunnen honing machine, a Barnes honing machine, a Pfauter Heavy Duty Hobbing Machine and a DeWalt radial arm saw (GC Exh. 64). Hetherington disconnected these machines and moved them out to the loading dock of the Buffalo facility. On March 6, he returned to Hastings.

Hetherington's supervisor, Dan Gilbert, the assembly shop foreman, also wanted to bring this machinery to Hastings. He discussed Hetherington's findings with Chief Operating Officer Jeffrey Gillesse, who directed Gilbert to determine the cost of transporting this machinery from Buffalo and installing it in the Hastings plant (Tr. 1306).

On Tuesday, March 16, 2004, Gillesse conducted a monthly "pizza meeting" for all the shop employees. Jeff Gillesse testified that at this meeting he discussed the equipment that Hetherington identified and moved at the CNB plant in Buffalo.

> It wasn't one of my agenda items, but I believe it might have been John Hetherington that raised the issue in the form of a question, where does this stand at this point, and again, at that point in time I was very much excited about the possibility of bringing this equipment over to Hastings as well, and so I think I reported to them that John had made the trip, that he had done a preliminary inspection and that we were in the process of accumulating information on trucking and so on.

Tr. 1310.

Three employees, John Hetherington, Wayne McClelland and Jason Sayles testified that Gillesse discussed bringing the machinery from Buffalo at a later date in either April or May. Gillesse held another "pizza meeting" on May 17. McClelland contends Gillesse talked about bringing the equipment from Buffalo at that meeting, Gillesse denies this. Regardless of whether or not he also discussed the Buffalo equipment at a later date, I credit Gillesse's testimony that he discussed it with employees on March 16. It is thus clear that BCN was actively considering moving a number of pieces of equipment from Buffalo to Hastings prior to

---

Relations Board.

filing of the representation petition on March 23 and that some time after the petition was filed, it decided not to do so.[5]

As part of its pre-petition plan to upgrade the Hastings facility, BCN sought to obtain additional machinery other than the machines at the CNB plant in Buffalo. For example, Gilbert directed John Hetherington to look for a Mazak lathe to augment another Mazak lathe already in the shop. BCN was also planning to repair some of its existing equipment, much of which was very old. One of the more versatile machines in the Hastings shop was a Mitsubishi Machining Center. In March 2004 this machine needed a new x-axis ball screw. Dan Gilbert directed John Hetherington to order one. On March 29, 2004, Mitsubishi sent Respondent a quote for the x-axis ball screw and the labor to install it. BCN placed an order for a ball screw. The ball screw was received and work was scheduled for its installation on June 7, the Monday following the Memorial Day weekend.

Hetherington, at Gilbert's direction, obtained a quote for the repair of a machine called the Landis O.D. grinder on March 9, 2004 (GC Exh. 67). Hetherington also obtained a quote for the repair of a vertical turret lathe, which was received on July 1, 2004 (GC Exh. 66).

On May 21, 2004, in a NLRB representation election, BCN employees chose the IAM to be their collective bargaining representative by a vote of 22-21. About a week later, Dan Gilbert directed John Hetherington to call Mitsubishi to cancel the installation of the ball screw. Hetherington did so, but Mitsubishi refused to allow BCN to return the ball screw, which is still in storage at the Hastings plant. Around the same time, Hetherington asked Gilbert the status of the equipment from Buffalo. Gilbert responded that BCN had a change in direction and that the machinery from the CNB Buffalo plant would never be sent to Hastings because, "since the election Ben [Landriscina] is really upset (Tr. 154)."[6]

---

[5] Ben Landriscina testified that he made a decision to "freeze" expenditures on capital equipment at Hastings, as well as consideration of transferring machinery from Buffalo in mid-April (Tr. 1643-44). I credit his testimony only to the extent that this decision was made after he became aware of the representation petition. It may well have been made earlier, or later, after he became aware of the results of the representation election.

[6] I credit Herrington's testimony in this regard over Gilbert's denial that he ever said any such thing to Herrington (Tr. 1121-22) and Landriscina's denial that he told Dan Gilbert or anyone else that he was upset over the results of the election (Tr. 1638). I conclude that Landriscina indicated to Gilbert or others in some manner that he was very angry that employees had selected the Union and that as a result that he was going to invest as little money as possible in the machine shop at Hastings and outsource as much work as possible. I also conclude that Gilbert said as much to Hetherington. First of all, in May 2003, Landriscina, as the Board found in 344 NLRB No. 26, threatened to close the facility if employees organized. This adds credibility to Hetherington's account that Landriscina acted in a manner consistent with that threat after the election in May 2004. Secondly, since Gilbert told employee Doug Edinger on June 30, 2003, that Landriscina "would close the place…if the Union came in," it is more than likely that Gilbert also told Hetherington that changes would occur in 2004 due to Landriscina's anger over the results of the election. Moreover, there is persuasive evidence that BCN's anti-union animus had not dissipated since 2003, e.g., Tr. 67-68. Additionally, Hetherington, who continued to work at BCN as of the date of his testimony, had little motive to fabricate his testimony, whereas Gilbert and Landriscina had considerable motive to fabricate theirs. Indeed, had Gilbert and Landriscina failed to contradict Hetherington, their failure to do so would have been a "smoking gun" with regard to all the 8(a)(3) allegations in this case.

Apart from the facts established in the prior case, I regard Hetherington to be a credible

Continued

Respondent, in fact, dramatically changed direction soon after the representation election. The issue in this case is why it did so. The General Counsel alleges that the change was motivated by anti-union animus. Respondent contends the change was motivated by new and startling information, recently available to it through its Job Ops computer program, regarding the inefficiency of the machine shop.

Ben Landriscina testified that in late July or early August he made a decision "to terminate about 18 people and put the company on a different path (Tr. 1636)". While not necessarily crediting Landriscina's testimony as to the date that he made this decision, it is clear that after the May 21 representation election, he either decided, or implemented a decision made contingently after the filing of the representation petition, to outsource most of the manufacture of replacement (original equipment manufacture or OEM) parts for the presses with the exception of expedited orders.[7]

On May 26, 2004, BCN filed objections to conduct affecting the result of the May 21 election. The hearing officer overruled Respondent's objections on July 23, 2004. On September 10, 2004, the Board adopted the hearing officer's report and issued a certification to the IAM as the exclusive bargaining representative of BCN's full-time and part-time manufacturing, assembly and maintenance employees at the Hastings facility. BCN thereafter recognized the Union and began bargaining with it.

In late July 2004, Gilbert, at the direction of Jeff Gillesse, dictated instructions regarding the repair of a list of machinery to John Hetherington, GC Exh. 7. Approximately 11 machines were not to be repaired at all. Among these were the Mitsubishi machining center and the

---

witness. As a current employee his testimony is particularly reliable in that it is adverse to his pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Flexsteel Industries,* 316 NLRB 745 (1995). Hetherington's demeanor, the internal consistency of his testimony and consistency of his testimony compared to other witnesses also leads me to conclude that Gilbert made the statement attributed to him by Hetherington regarding Ben Landriscina's reaction to the results of the election.

Finally, Respondent conducted voir dire regarding G.C. Exhibit 7, a list of machines that Hetherington testified that he prepared at the direction of Dan Gilbert in July 2004. Hetherington testified that this is a list of machines that Gilbert told him, with a few exceptions, not to repair. Respondent's voir dire was conducted in a manner that suggested that the list was not authentic (Tr. 171-75) and it objected to its admission. At Tr. 1133-1135, however, Gilbert confirmed that G.C. – 7 was the list of machines that he had dictated to Hetherington in July 2004, as Hetherington had testified two months earlier. This is another factor contributing to my belief in Hetherington's credibility.

Contrary to the arguments made in Respondent's brief at pages 57-60, Jeff Gillesse's testimony that he directed Dan Gilbert to curtail repairs on the machinery in the Hastings plant in July (Tr. 1319), also lends plausibility to Hetherington's testimony as to the time frame of his conversation with Gilbert. Clearly some of the decisions leading to the August lay-off were made or finalized after the May election. Hetherington's testimony that he was told to cancel the order for the ball screw for the Mitsubishi machine *after the Union election* is uncontradicted by any reliable evidence, Tr. 156-57, 1452-53 [Also see testimony of Stephen Jenks at Tr. 672-73].

[7] The amount of work outsourced from the Hasting plant increased dramatically in June and July 2004 compared to March, April and May, but not when compared to January and February 2004.

In addition to OEM parts, BCN also sells commercial parts for the presses which are off-the-shelve items generally manufactured by other companies.

Landis O.D. grinder. A slightly larger number, including the vertical turret lathe, were only to be repaired after consultation with Gilbert. Hetherington was told that there were only five machines that the maintenance crew could continue to repair without Gilbert's prior approval.[8]

At about the same time, or perhaps a little earlier, Jeff Gillesse discussed the versatility of the machine shop employees with Arch Howard, the machine shop supervisor, and Dan Gilbert. Gillesse took notes at this meeting on his computer. He did not indicate to Howard or Gilbert that their assessments might be used in determining which employees should be retained and which should be laid-off. Indeed, Gillesse did not indicate to Howard and Gilbert that there would be a lay-off.

Contrary to BCN's assertions, Respondent's management had been aware almost from the start of BCN's operations that the machine shop was inefficient, due at least in part to the age and condition of its machinery. For example, assembly shop supervisor Dan Gilbert testified that he had been aware of this fact for two or three years prior to 2004 from looking at the work tickets (Tr. 1155-1157).[9] Ben Landriscina testified that "we had suspicion about the inefficiencies of the shop" prior to April 2004 (Tr. 1634). Moreover, BCN had a computer system, MAPICS that provided enough information to apprise management of the inefficiencies of the machine shop. For example, one could tell from MAPICS how long it took to produce a particular part. BCN was also able to determine what operations of which machines were taking longer than the time budgeted for the operation (e.g., Tr. 78-80).

There is contradictory evidence as to how difficult it was for Respondent to pinpoint inefficiencies in the plant prior to the implementation of the Job Ops computer program in late 2003 and early 2004. Respondent's Comptroller Jerry Horton testified:

> You would have to go back to all the work tickets that were turned in and do a lot of databases that type of thing, and try and create that system which we already had in Job Ops.

Tr. 1008.

However, Randall Beduhm, who worked as a data processing manager at BCN until May 2004, testified that using MAPICS, BCN produced labor efficiency reports that showed how well employees performed in terms of actual time to do an operation on a part, as compared to established standards, Tr. 800-804.

In any event I conclude that Respondent was well aware long before it started getting detailed reports from the Job Ops system in March 2004 that the machine shop was very inefficient. I discredit BCN's contention that it obtained new startling information in this respect starting in March 2004[10] and find that its reliance of this "new" information is a pretextual explanation for its decision to outsource most of the production work at Hastings and lay-off 60% of the 25 machine shop employees.[11]

---

[8] Not every machine was on the list, but it included most or all or the machines that were used on a regular basis.

[9] Also see Jeff Gillesse's testimony at Tr. 1229 and Exhs. R-6 & R-7, which establish that the work tickets contained the actual time spent working on a part, as well as the time it was supposed to take to do a particular operation.

[10] Landriscina's testimony at Tr. 1634 essentially concedes this point.

[11] Even according to Gillesse, the Job Ops information regarding the inefficiency of the

Continued

Jeff Gillesse testified that with the information BCN obtained from Job Ops from March through July 2004 regarding shop efficiency and estimates that it had obtained as to what it would cost to repair existing equipment, "we really had only two options."

> One would be obviously to address the current shop and to invest significant amounts of money in the machinery equipment to make repairs so it could be used in a productive efficient way for normal production, or to increase the outsourcing.

Tr. 1246-47.

I infer that prior to the filing of the representation petition, Respondent had made a decision to invest sufficient money in the machine shop to make it profitable to produce OEM parts at Hastings rather than outsource this work. Upon the filing of the representation petition, Respondent reconsidered that decision and sometime after the representation election implemented a decision, to outsource the bulk of OEM parts production.[12] This decision may have been implemented in stages, such as putting a hold on transferring the equipment from Buffalo, lining up subcontracts and then determining when to have a lay-off as well as how many employees and which employees to lay-off.[13]

The August 16, 2004 meeting

Although its objections to conduct affecting the May 21 election were still pending, BCN invited union representatives to meet with it on August 16, 2004 in a conference room at a hospital in Hastings.[14] Through an oral presentation and written materials (GC Exh. 12),

---

machine shop was available to him by March 1, 2004, Tr. 1361. Even so, Respondent was on a course to repair existing machinery, acquire new machinery and increase in-house production of OEM parts until sometime after the representation petition was filed.

Moreover, the assertion by Respondent's witnesses that the Job Ops program did not reveal the inefficiency of the machine shop until April 2004 is incredible. BCN received the Job Ops computer software in April 2003, started testing it in June 2003 and started relying on it exclusively on October 1, 2003 (Tr. 996-97). I decline to credit the notion that BCN switched to exclusive reliance upon a program that gave it virtually no useful information regarding the efficiency of the machine shop for five months after its implementation.

Finally, BCN Comptroller Jerry Horton's testimony at Tr. 1014-1015 essentially concedes that Respondent could determine whether it would be cheaper to make a specific part at the Hastings plant or by subcontracting the work under the MAPICS computer program used by BCN prior to the implementation of Job Ops.

[12] BCN had always outsourced some of its OEM production, but significantly increased its outsourcing after August 30, 2004. In fact, prior to the filing of the representation petition Respondent was planning to decrease the amount of its outsourcing consistent with its upgrading of the machine shop.

[13] Respondent's brief at pages 59-60 indeed suggests that not all the decisions at issue in this case (putting a hold on acquiring new machinery, suspending repairs on existing equipment, outsourcing most machine shop work and the lay-off) were made at the same time. In emphasizing the possibility that BCN may have been waiting for the outcome of its objections to the May 21 election, the brief itself indicates that the decision to implement a mass lay-off may have some temporal relationship to the Hearing Officer's July 23, 2004 decision overruling BCN's objections.

[14] Respondent did not recognize the Union as the bargaining representative of its employees until September 10, 2004, when the Board overruled its objections.

Respondent informed the Union that it was going to lay-off approximately 15 of the 25 machinists, one maintenance, one assembly and one stockroom employee at the Hastings plant early in the week of August 23. BCN's written materials concluded, "BCN will evaluate and consider any reasonable alternative which may be provided by the IAM to the actions required in order to achieve the same cost reductions and operational improvements."

Union representatives suggested that Respondent recognize the Union and start bargaining with it. They also noted that, given BCN's continued pursuit of its objections to conduct affecting the election, the union did not represent the employees at the Hastings plant. Union representatives asked Respondent how employees were to be selected for lay-off. Company representatives told them that this was yet to be determined.

On Wednesday, August 25, Respondent's attorney, Robert Sikkel, called Union Business Representative Paul Shemanski. Shemanski was not in his office and Sikkel left a message. The next day, Union Business Representative Peter Jazdzyk returned Sikkel's call for Shemanski. Sikkel informed Jazdzyk that employees would be laid off on Monday, August 30 and paid through the 31st. He described very generally the manner in which employees would be selected for retention or lay-off. Sikkel stated that the company was retaining the most versatile employees, or those with specialized skills, who had performed the best in operating the machines needed to meet customer demands. Sikkel did not identify the employees selected for retention or lay-off and did not elaborate as to the method Respondent used to rate its employees. He also did not inform the Union that laid-off employees would be eligible for recall for only 90 days. Sikkel told Jazdzyk that if the Union had any further questions, if should contact him.

On Friday, August 27, at 5:25 p.m. Sikkel emailed Paul Shemanski, informing Shemanski that he "updated" Peter Jazdzyk "by way of follow-up to the August 16 meeting." The Union did not initiate contact with BCN either in response to Sikkel's telephone conversation with Jazdzyk, or the email.

On Monday, August 30, 2004, Respondent informed 18 of its Hastings employees that they were being laid off. Employees informed the Union that the lay-off had occurred. The shop employees were informed by letter that they were being laid-off with a 90-day recall option. The letter stated further that, "[t]he 90-day recall option provides for reinstatement of any laid-off employee, at the Company's discretion, within a 90-day time period beginning on the date of the lay-off." Prior to August 30, BCN had never informed laid-off employees that their recall rights were limited to 90 days. Indeed, BCN had never before invoked such a limitation in prior lay-offs. For example, employees who were laid off in September 2003 were not told their recall rights were limited to 90 days. Three, however, were recalled 90 days after their lay-off.

Of the 15 machinists laid off, the following had openly supported the Union during the organizing campaign: Greg Cole, Loran "Jim" Cowham, Eric Frie, Vernon Hayes, Shane Howard, Eric Hutchings, Mark Jensen, Wayne McClelland and Michael McDonald. Stephen Jenks supported the Union, but Respondent may not have been aware of that fact. Greg Cole and Wayne McClelland were particularly prominent supporters of the Union as they distributed union handbills outside the Hastings facility. Wayne McClelland was the union's steward before being laid-off and posted notices of union meetings on a bulletin board at the plant.

Among the ten machinists retained, BCN management knew that three had supported the Union during the organizing campaign, David Birman, Steve Lincks and Jason Sayles. Birman and Union supporter Mark Jensen were the only employees running vertical turret lathes. Respondent had to retain one of them in order to operate the machine shop at all (Tr.

92).[15] The same is true with regard to Lincks and Michael McDonald, who were the only employees operating a hydrotail, which is a large vertical milling center.[16] Sayles worked as a "floater" running many different machines and probably was the most versatile employee in the machine shop (Tr. 616). He was the only one of three boring mill operators who was retained (Tr. 201). All three were pro-Union. He may also have been the only employee who knew how to run the vertical turret lathe (or Numera Center) after Wayne McClelland was laid off. This machine continued to be used daily after the lay-off and Sayles trained employee Michael Johnson on the machine for some period of time (Tr. 36-37).

Five of the machinists who were laid off never demonstrated support for the Union. However, of the five (Lyle Hill, Jerry Hurless, David Hurtado, Dennis Kling and Orie Perry), only 73 year-old Jerry Hurless made his opposition known to any supervisor and that was Arch Howard. Moreover, Respondent may have assumed that Perry was pro-Union. He ate lunch every day with Wayne McClelland, one of the two most prominent union supporters, and is the father-in-law of Mike Shapley, who BCN fired for union activity in 2003 (Tr. 626). The most openly anti-Union employees, such as machinists William Abbott and Randy Rice, were retained.

BCN laid off one of its three maintenance employees, Larry Moran, the only one who openly supported the Union. As stated earlier, the Board has previously found that in 2003, Supervisor Daniel Gilbert harassed Moran on account of his union support and deprived him of the opportunity to work an additional shift due to his participation in Board proceedings.

BCN laid off only one of the seven employees in the assembly area, William Chrysler, who happens to be the only assembly room employee who openly supported the Union. There is no evidence as to how and why Respondent decided to lay-off anyone in the assembly area, or how and why it selected Chrysler.[17] As discussed in more detail, Respondent's unexplained selection of Chrysler is one of the revealing pieces of evidence that the lay-off and the selection process were motivated by anti-Union animus.[18]

The selection process for laying off machinists

In determining which machine shop employees to lay-off and which to retain, Respondent gave no consideration to seniority, which it also did not consider in the 2003 lay-off. BCN also did not consider employees' prior performance evaluations. Instead, it relied on an ad

[15] In addition to producing expedited parts, Respondent needed to maintain some level of machine shop operations to support the rebuild/assembly business of the Hastings plant.

[16] It is unclear whether Respondent was aware of or was certain of the Union sympathies of machinist David Main. Main, who retired at the end of May 2005, and Shane Howard, an openly pro-Union employee who was laid off, were the employees who ran the Cincinnati CNC lathe. Similarly, there is insufficient evidence regarding machinist David Sigurdson's sympathies or whether or not Respondent was aware of them. Sigurdson and David Decker, who was also retained, attended some union meetings at Wayne McClelland's home. However, Decker led Supervisor Arch Howard to believe that Decker was opposed to the Union.

[17] One of the three stockroom employees, Darrin Burtch was also laid off. There is no evidence that he supported or opposed the Union, nor how and why he was selected for lay-off. He may not even have been a member of the bargaining unit.

[18] I give no weight to Dan Gilbert's testimony at Tr. 1186 that he thinks Doug Edinger wore a union hat a couple of times. There is no other evidence that Edinger was a union supporter. Moreover, as BCN's only welder, Edinger was indispensable.

hoc evaluation system which produced a score for each employee on the basis of efficiency, discrepancy reports (DRs) and versatility. The evaluation system assigned a final score to each machine shop employee, which Respondent used to explain its selection of employees for lay-off or retention. Scores ranged from 1, the most desirable score, to 4, the least desirable. The final score was a product of scores assigned in the aforementioned categories, with 45% weight being given to efficiency; 20% to DRs and 35% to capabilities, which allegedly measured an employee's versatility.

To measure each machine shop employee's efficiency, Respondent calculated the amount of time the employee spent making parts for the period March through July 2004 and compared that with the amount of time, or standard, that an employee was supposed to spend on making these parts. Thus David Decker, for example, spent 643.55 hours working on parts that should have taken him 377.75 hours during this five month period, giving him an efficiency rating of 58.67%.

A DR is a mistake which cost BCN money and was an individual employee's fault. Respondent calculated the dollar amount of DRs each machine shop employee had for the period of January 1, to July 31, 2004, assigned a numerical value to that amount and gave it 20% weight in calculating the final score that determined whether an employee would be retained or laid-off. Thus David Decker, whose DRs cost BCN only $22 during this time period, was assessed a score of 1 (1 being the best; 4 the worst) for DRs.

However, in weighing the effect of DRs in determining whether to retain an employee, Respondent made allowances for anti-union employees William Abbott and Randy Rice that it did not make for other employees.

Respondent contends the capabilities or versatility score, which accounted for 35% of each employee's final score, reflects an evaluation made in a meeting that Jeff Gillesse held with the machine shop supervisor, Arch Howard, and the assembly room supervisor, Dan Gilbert, in July 2004. It is clear that such a meeting occurred and that Gillesse asked Howard and Gilbert to assign a number, 1-4, to each machine shop employee that reflected how many different machines or machine centers the employee could run.[19] Gillesse did not tell Howard and Gilbert the purpose for this rating in July. Moreover, Respondent has not established that the scores assigned by it to each employee (R. Exh. 9) emanated from Gillesse's meeting with Howard and Gilbert. Neither Howard nor Gilbert kept any notes of this meeting and neither testified that the employees' scores were consistent with what they told Gillesse at the July meeting. Due to the absence of such testimony by Howard and/or Gilbert I decline to accept Gillesse's testimony concerning R. Exhibit 9 at face value. Thus, I decline to credit his testimony in this regard.[20]

The methodology used for the 2004 lay-offs differed from that used previously in employees' annual performance evaluations and for prior lay-offs. For example, an employee's

[19] Gilbert supervised the machine shop when Howard was absent.

[20] There is a discrepancy between Arch Howard's testimony and Jeff Gillesse's testimony as to how Howard's rating of employees regarding versatility was communicated to Gillesse. Howard testified that he gave Gillesse a written list (Tr. 74-76). Gillesse testified that Howard rated the employees orally and that Gillesse entered these ratings into a spreadsheet on his computer, (Tr. 1283-87). Dan Gilbert's account is that Gillesse recorded the ratings on his computer, but his testimony indicates that he did not observe what Gillesse was recording.

attendance record was not considered in determining whether to retain or lay-off an employee. This particularly worked to the advantage of William Abbott, an openly anti-union employee.

Respondent's evaluation system thus provided BCN with tremendous opportunities to manipulate the results to maximize the number of union supporters it could lay-off and the number of anti-union employees it could retain. The opportunity for discrimination was greatly enhanced by the fact that Arch Howard, the one individual who actually knew the capabilities of the machine shop employees, played no meaningful role in the selection of machinists for lay-off. I conclude that Respondent took advantage of these opportunities and that its selection of employees for lay-off was discriminatorily motivated. Some of the most compelling evidence in this regard concerns Eric Frie, a pro-Union employee, who was laid-off.

Frie was not rated at being proficient in running any machines or machine centers. Thus, Frie received a high and undesirable number of points in Respondent's evaluation system—maximizing his chances of being selected for lay-off. That this rating is the product of a system designed to get rid of union supporters is indicted by the following:

> On November 12, 2003, Arch Howard gave Frie a 2.88 rating in his annual performance evaluation, a better than average rating.
> On the basis of this review, Frie was one of the top 30% of machine shop employees and thus received a $500 bonus at Christmas in 2003 (Tr. 864-5, 1628-32).
> This bonus was approved by Gillesse, Adams and Landriscina.
> Frie received a merit wage increase on March 1, 2004.

The result-oriented nature of the August evaluation is also indicated by the fact that two pro-union employees with very bad scores were given very large wage increases by BCN on March 1, 2004. Shane Howard received a total wage increase of 7.5% (4% merit; 3.5% market adjustment) and Mark Jensen received a 12.1% increase (3% merit; 9.1 market adjustment). Howard was also one of the 30% of the BCN machinists given a $500 bonus for his performance in December 2003.

Other examples of discriminatory manipulation involve Greg Cole and Wayne McClelland, two of the most prominent union supporters in the machine shop. On Respondent's score sheet for versatility/capability Cole is listed as the primary operator of the ovens in which parts are heated (heat treat). Jeff Gillesse was aware that Cole could operate the ovens and yet he was not given credit for this capability. Gillesse, at trial, could offer no explanation for this omission (Tr. 841, 1424 -1427).[21]

McClelland was laid off ostensibly because he only ran one machine which "will be relegated to only limited use…," R. Exh. 11. In fact, the machine operated by McClelland has

---

[21] Cole made sure that Respondent was aware of his experience in a number of different areas, including heat treat, by giving a list to BCN's Human Resource Manager, Carol Rogers, on August 20, 2005 (Exh. G.C.-29).

Respondent at page 28 of its brief states that "certain other types of experience, such as heat treat ovens and forklift operation were not the focus of this analysis, as they were not viewed as skilled machine operations." There is no evidence in this record, of which I am aware, that supports this assertion. In fact, Jeff Gillesse's testimony at Tr. 1424-1433 is completely to the contrary. Moreover, it appears to be contradicted by the fact that anti-Union employee Randy Rice was evaluated on his ability to operate the heat treat ovens and that his experience with heat treat was cited as a reason for retaining Rice, Exhs. R-9, R-10, R-11.

been operated by an anti-Union employee, Michael Johnson, on a full-time basis ever since the lay-off. Johnson had little or no recent experience operating this equipment, a CNC tape drill (or vertical turret drill) and had to be retrained in its use after the lay-off.

Finally, as mentioned before, BCN has offered no explanation for the rating given to William Chrysler, the only employee who was laid off from the assembly room, who was also the lone open union supporter. It also, as explained below, obviously discriminated against Eric Hutchings by refusing to consider and hire him for one of two open inspector positions in early 2005. The obvious discrimination against Chrysler and Hutchings is a contributing factor for my inference that the rating system was manipulated to justify the lay-off of a disproportionately large number of pro-Union employees from the machine shop and the retention of those who were openly anti-Union.[22]

The failure to rehire and/or recall Eric Hutchings

In March 2005, both of BCN's quality inspectors, David Preston and Donald Nottingham, retired.[23] The General Counsel argues at page 29 of its brief that Respondent expected the imminent retirement of several of the employees it retained on August 30 and that this was motivation for limiting the laid-off employees' recall rights to 90 days.[24] Based on the great lengths that BCN went to avoid rehiring Eric Hutchings for either of the inspectors' positions, I draw the same inference.

Respondent placed blind advertisements for two quality inspectors in several newspapers. It was not BCN's normal practice to run employment advertisements which did not identify BCN as the employer. Similarly, it was not BCN's normal practice to set forth experience requirements for applicants, as it did in advertising for the inspector positions, GC Exh. 27. The ad run in *The Hastings Reminder* on February 15, 2005 required:

> 8 to 10 years experience inspecting mechanical components parts preferably in the metal forming equipment industry. Must read blueprints, micrometers and calipers as well as possess good communication and computer skills. CMM experience a plus…

Eric Hutchings, one of the machinists laid off on August 30, 2004, submitted a resume in response to this advertisement on February 24, 2005. Hutchings' resume indicated that he had performed final inspection on all outgoing products using basic measuring equipment and CMM Table, GC Exh. 26.

Hutchings performed the inspection (CMM and manual) jobs, for which Respondent was advertising, from January 2001 through August 2001 at the CNB/BCN facility in Hastings. All three of BCN's production/quality supervisors, Arch Howard, Dan Gilbert and Philip Schlacter,

---

[22] Respondent, in laying off machine shop employees, gave no consideration to the fact that some had several years experience in the assembly room. Supervisors Dan Gilbert and Arch Howard were aware of this and the Union pointed this out to Respondent at the August 16 meeting. Respondent's decision to ignore this fact is suspect in that virtually all the assembly employees, who were not particularly busy prior to the lay-off, were opposed to the Union.

[23] Preston and Nottingham's jobs differed. Preston generally operated the computer-based CMM or beta inspection machine. Nottingham used a hand-held micrometer to inspect incoming parts.

[24] For example, Respondent had known for some time prior to August 30, 2004, that inspector David Preston was planning to retire in the near future (Tr. 733).

were aware of Hutchings' experience as an inspector. Hutchings performed the inspector's job for months without any supervision and there is absolutely no evidence that his performance as an inspector was unsatisfactory. He also performed at least satisfactorily as a machinist while working at BCN. On October 2003, BCN gave Hutchings a $2.00 per hour performance-based wage increase (Tr. 1447). Nevertheless, in early 2005, Respondent did not even interview Hutchings for either inspectors' positions—on the obviously pretextual grounds that he did not have the required 8-10 years of experience.

BCN ran the same ad for an inspector on April 25, after it hired Lyle Lake to fill one of the inspector's positions. Respondent awarded the second inspector's position to David Boomer, an anti-union assembly room employee (Tr. 1454), with virtually no inspection experience.

Respondent has provided no explanation for why an employee needed 8-10 years experience to adequately perform the inspector's job. Indeed, it appears that Karen Adams came up with this criterion out of thin air and quite possibly with the expectation that BCN might receive an application from Hutchings, whose father worked for Respondent in the purchasing department. Hutchings was therefore likely to find out about these job openings. Indeed, I find that this expectation was the motive for placing the blind ads and requiring experience that Hutchings did not have. Moreover, Respondent did not notify the Union or give it an opportunity to bargain over the addition of this experience criterion, which was new for the inspectors' jobs.

Secondly, Respondent was quite willing to overlook candidates who did not have such experience when it had no reason to believe that they supported the Union. David Boomer, an anti-union employee who was awarded Nottingham's job, did not have 8-10 years as an inspector. He had far less experience as an inspector than Hutchings. Respondent gave Boomer some limited training as an inspector after the August 2004 lay-off and then trained Boomer on the beta inspection machine, on which he had no experience, sometime in early 2005. Philip Schlacter, who supervised the inspectors, also interviewed two other applicants who did not have 8-10 year experience, (Tr. 1091-96).[25]

Eric Hutchings did not lie about his qualifications for the inspector's jobs as Respondent asserts in its brief and Respondent did not refuse to consider or hire him for either inspector's positions on the basis on any inaccurate statements in his resume.

Respondent asserts at page 71 of its brief that, "Mr. Hutchings was considered and his resume reviewed, but because his resume demonstrated on its face that he was not qualified, and it further demonstrated that *he lied* about his qualifications, he was not selected."(Emphasis added, Also see brief at page 72).

On the resume Hutchings submitted to BCN on February 24, 2005, in response to a blind advertisement, he listed under the heading of experience:

1995-2002 CNB International, Hastings, MI 49058
* (2001-2002) Final Inspections

[25] I discredit Schlacter's testimony that Eric Hutchings was still in training as an inspector in August 2001. Instead, I credit Hutchings' testimony, corroborated by David Preston, that his training lasted 5- 6 weeks. After that Hutchings worked on the second shift as an inspector without supervision.

Performed final inspection on all outgoing product using basic measuring equipment and CMM Table.

*(1995-2001) Machinist

This information is incorrect in that Hutchings performed the inspection job from January 2001 until August 2001, when he was laid off. Also, although his employer at the Hastings plant was CNB International prior to May 2001, in that month his employer became BCN. A lie is defined as a false statement meant to deceive or give a false impression. There is nothing to indicate that the inaccuracies in his resume, which are not material misrepresentations, were intended to deceive a prospective employer as to his qualifications. Hutchings, did not, as Respondent asserts, *lie.*

Moreover, there is nothing in this record that indicates that Respondent relied upon these inaccuracies in deciding not to interview or consider Hutchings for one of the inspector positions. Philip Schlacter testified that he noticed that Hutchings had listed incorrect dates and failed to recognize that the identity of his employer changed to BCN in 2001 (Tr. 1007). However, neither Schlacter nor anyone else testified that these mistakes were relied upon in deciding not to consider Hutchings for recall or reemployment. Indeed, Schlacter testified that he gave Hutchings' resume to Human Resources Manager Carol Rogers so that Hutchings might be considered for any entry-level positions that might become available (Tr. 1064). Respondent eliminated Hutchings from consideration for either inspector's position solely on the pretextual grounds that he did not have 8-10 years of experience as an inspector (Tr. 743, 1063-4).

Analysis and Conclusions of Law

Respondent violated Section 8(a)(3) as alleged in the Complaint

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. Once the General Counsel makes this initial showing, the burden of persuasion shifts to the Respondent to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981); *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002).

In the instant case there is no question that Respondent knew employees engaged in union activity and that it harbored animus towards their protected activity. Animus is established in part by the fact that in 2003 Respondent fired two employees for engaging in union activity. However, it is also established by much of the same evidence that proves discriminatory motivation. The central issue in this case is whether Respondent changed its plans to bring the Buffalo equipment to Hastings, ceased to repair its machinery, increased outsourcing and laid off employees on August 30, 2004 due to union activity, or as it contends, due to the availability of data that showed for the first time that BCN would be better off outsourcing the manufacture of most OEM replacement parts than making them in-house.

The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *American Gardens*

Management Co., 338 NLRB No. 76 (November 22, 2002). Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions.

> Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d 863, 871 (6th Cir. 1995).

As noted by the Court of Appeals for the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966):

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book. Nor is the trier of fact-here a trial examiner-required to be any more naïf than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal-an unlawful motive-at least where, as in this case, the surrounding facts tend to reinforce that inference.

Accord, *Fast Food Merchandisers*, 291 NLRB 897,898 (1988), *Fluor Daniel, Inc.,* 304 NLRB 970, 971 (1991).

In addition to its 2003 violations of the Act, I infer both animus and discriminatory motive for all the 8(a)(3) allegations in this case from the record as a whole. However, the following are the most obvious examples of record evidence establishing animus and discriminatory motive:

1) the obvious pretextual reliance of the Job Ops data in view of the fact that Respondent had been aware of the inefficiencies of the machine shop for several years, knew that this inefficiency was largely due to the disrepair of its machinery and had plans to repair and augment this machinery until it learned of the representation petition;
2) Respondent's utter failure to explain how it selected William Chrysler, the only openly pro-union employee in the assembly room, for lay-off.[26]
3) The obvious discrimination against Eric Hutchings in failing to consider and hire him for the open inspector positions in early 2005. The obviousness of Respondent's discriminatory motive regarding Hutchings is in turn established by:

[26] Although Exh. R-10 purports to assign to Chrysler a higher (worse) score than any other employee in the assembly department, there is absolutely no evidence as to how that score was determined. His DR numbers were better than three other assembly room employees and there is nothing in this record to support the score given Chrysler for capabilities/versatility.

A. The imposition of experience criteria without any showing that such criteria were necessary or even preferable for an employee to perform the inspection jobs.[27]
B. Respondent's disregard of these criteria when considering other applicants, particularly anti-union employee David Boomer, who clearly had inferior qualifications for the inspector's positions than Hutchings.

4) Respondent's decision to depart from its past practices for purposes of selecting employees for lay-off, including its disregard of recent evaluations and other indicia of performance that predated the filing of the representation petition, and its total reliance on an ad-hoc rating system that maximized its opportunities for chicanery.

5) Respondent's departure from past practice in limiting employees' recall rights to 90 days.

Where, as in the instant case, the central aim of a lay-off is to discourage union activity and/or to retaliate against employees because of the union activities of some, the lay-off is unlawful even though employees who might have been neutral or even opposed to the Union are laid-off with their counterparts. This is true even when some union supporters are not laid off. The issue in such a case is the employer's motive in ordering extensive lay-offs rather than the anti-union, neutral or pro-union sympathies of particular employees, *McGraw of Puerto Rico, Inc.,* 322 NLRB 438, 451 (1996) enfd. 135 F. 3d 1 (1st Cir. 1997); *Birch Run Welding and Fabricating v. NLRB,* 716 F.2d 1175, 1180 (6th Cir. 1985).

Respondent also violated Section 8(a)(5) as alleged

Respondent's decision to subcontract most of its OEM replacement parts also violated Section 8(a)(5). BCN's subcontracting and lay-off decisions were mandatory subjects of bargaining because Respondent in effect substituted the subcontractor's employees for its own, *Gaetano & Assoc.,* 344 NLRB No. 65 (April 25, 2005); *"Automatic" Sprinkler Corp.,* 319 NLRB 401 (1995).

BCN's argues that it afforded the Union an opportunity to bargain over the lay-off on August 16, 2004, while its objections were pending, and that the Union waived its bargaining rights on this subject. This contention is without merit. An employer can either recognize a union as the collective bargaining representative of its employees and bargain with it, or contest its status; it cannot do both, *Terrace Gardens Plaza v. N.L.R.B.,* 91 F. 3d 222 (D.C. Cir. 1996). "The Board has consistently found that where an employer continues to challenge the validity of a union's certification, it is effectively refusing to bargain with the union, even where it has stated that it is willing to engage in negotiations," *Fred's Inc.,* 343 NLRB No. 22 (2004); *GKN Sinter Metals, Inc.,* 343 NLRB No. 46 (2004). Thus, BCN did not fulfill its obligations to bargain with the Union on August 16, and the Union did not waive its bargaining rights. Indeed, Respondent could not legally bargain with the Union until it recognized the IAM as the exclusive bargaining representative of its employees.

[27] So far as this record shows, Hutchings was as qualified for the inspectors' position on the basis of his seven to eight months of experience as somebody with 8 – 10 years. I note in this regard that the law of diminishing returns is applicable to many jobs when it comes to experience.

In arguing that it fulfilled its bargaining obligations and that the Union waived its bargaining rights, BCN relies on *Clements Wire,* 257 NLRB 1058 (1981) in which the Board stated:

> Although an employer may properly decide that an economic layoff is required, once such a decision is made the employer must nevertheless notify the Union, and upon request, bargain with it concerning the layoffs, including the manner in which the layoffs and any recalls are to be effected. By failing to so notify the Union while its objections to the election were pending, Respondent acted at its peril and, since the Union was thereafter certified as the collective bargaining representative of its employees, Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Clements Wire is a case in which the employer *did not* notify the Union of its plans for lay-off, thus the quoted language of the decision is *dicta* with regards to situations in which an employer purports to negotiate with a union which it refuses to recognize. The proposition that the case actually stands for is that an employer must simply refrain from changes in mandatory subjects of bargaining until its objections are resolved. By refusing to recognize the Union and challenging its right to certification, BCN was challenging the Union's authority to speak for bargaining unit employees. Thus, it cannot claim on the one hand that the Union has no right to represent its employees and on the other that the Union waived bargaining rights that BCN refused to recognize.[28]

I assume that BCN filed and maintained its objections in good faith. Had it prevailed on those objections, bargaining with the Union on August 16, 2004, when the Union did not represent an uncoerced majority of its bargaining unit employees, would have violated Section 8(a)(2). Furthermore, the Union's bargaining in such circumstances would have violated Section 8(b)(1)(A), *International Ladies Garment Workers Union v. NLRB,* 366 U.S. 731, 81 S. Ct. 1603 (1961).

Respondent's implementation of a 90-day limit on employee recall rights also violated Sections 8(a)(5) as well as 8(a)(3). This was a unilateral change which Respondent implemented during the pendancy of it objections—at its peril. The fact that employees were recalled 90 days after lay-off in 2003 does not establish any sort of past practice justifying the 90-day limit enunciated in 2004. There is no evidence of any practice or rule in this regard prior to August 2004. The 2003 recall may have occurred after 90 days simply because that it when economic conditions warranted it.

[28] Assuming that BCN could negotiate and challenge the Union's status as collective bargaining representative at the same time, I would find that Respondent did not provide the Union with an opportunity to bargain with respect to the manner in which employees were selected for lay-off. By providing only very general information as to how the selections were made four days before the lay-off (with an intervening weekend), BCN presented the Union with a *fait accompli* as to this aspect of the lay-off. Therefore, the Union cannot be said to have waived any bargaining rights with regard to the selection process or the 90-day limit on recalls, about which the Union was not provided any notice, *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023 (2001).

Respondent through Daniel Gilbert violated Section 8(a)(1)

It is well settled that an employer violates Section 8(a)(1) by making statements that would reasonably tend to interfere with, restrain or coerce employees in the exercise of their section 7 rights, regardless of whether employees are in fact intimidated by the remarks, *Helena Laboratories Corporation,* 228 NLRB, 294, 295 (1977); *Palagonia Bakery Co., Inc,* 339 NLRB No. 74 (2003). I find that Respondent, by Daniel Gilbert violated Section 8(a)(1) in explaining to John Hetherington that the machinery from Buffalo would not be transferred to Hastings due to Ben Landriscina's anger over the election. Regardless of whether Hetherington was inclined to engage in union or other protected activity, Gilbert's remark would reasonably tend to inhibit Hetherington, and other employees to whom Hetherington might relate this conversation, from doing so.

Summary of Conclusions of Law

1. Respondent, by Daniel Gilbert, violated Section 8(a)(1) by informing an employee that Respondent was changing the nature of its operations at Hastings, Michigan and would not be bringing machinery into the Hastings plant from the CNB plant in Buffalo because employees had voted for the Charging Party to be their collective bargaining representative.
2. Respondent violated Section 8(a)(3) of the Act by canceling plans to bring the Buffalo machinery to Hastings; increasing the amount of work outsourced from Hastings; ceasing to repair machinery at Hastings; deciding to lay-off 18 employees at the Hastings plant; manipulating the selection process to maximize the number of pro-Union employees laid off and limiting employees' recall rights to 90 days.
3. Respondent also violated Section 8(a)(3) by changing the qualifications for its inspector positions, refusing to consider for hire and refusing to hire Eric Hutchings for one of those positions.
4. Respondent violated Section 8(a)(5) of the Act in failing to bargain with the Union over its decision to outsource production and to lay-off employees. It also violated Section 8(a)(5) in its failure to bargain with the Union with respect to the selection process for lay-offs, the 90 day recall limitation and the change in the qualifications for the inspector positions.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid-off employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This remedy applies to all employees laid off on August 30, 2004, even those who did not support the Union or engage in any union or protected activity, *Vada of Oklahoma, Inc.,* 216 NLRB 750, 759 (1975); *Majestic Molded Products, Inc., v. N.L.R.B.,* 330 F. 2d 603, 606 (2nd Cir. 1964).[29]

[29] As the Second Circuit put it, a mass lay-off violates Section 8(a)(3) if motivated by a desire to discourage union membership, "even if some white sheep suffer along with the black."

Respondent having, since March 23, 2004, subcontracted and outsourced bargaining unit work in violation of Sections 8(a)(3) and (5) must restore this work to the bargaining unit.

Because the Respondent has a proclivity for violating the Act (see, e.g., 344 NLRB No. 26), and because of the serious nature of the violations and because of the Respondent's egregious and widespread misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Bliss Clearing Niagara, Hastings, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying-off employees, limiting employees' recall rights, refusing to consider for hire or hiring, or otherwise discriminating against any employee for supporting the International Association of Machinists and Aerospace Workers (IAM) or any other union.

(b) Failing and refusing to bargain in good faith with the International Association of Machinists with respect to the terms and conditions of employment of bargaining unit employees, including, but not limited to: unilaterally laying off employees, limiting their recall rights, implementing a selection process for lay-offs, outsourcing or subcontracting production work and changing the qualifications for bargaining unit positions.

(c) Interfering with, restraining and coercing its employees by threatening employees with changes in the nature of its operations as the result of their selection of the Union as their collective bargaining representative.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its full-time and part-time manufacturing, assembly and maintenance employees at its Hastings, Michigan facility, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Restore all of the operations formerly performed by bargaining unit employees which have been subcontracted or outsourced since the filing of the representation petition on March 23, 2004.

(c) Within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

> Greg Cole, Loran "Jim" Cowham, Eric Frie, Vernon Hayes, Lyle Hill, Shane Howard, Jerry Hurless, David Hurtado, Eric Hutchings, Stephen Jenks, Mark Jensen, Dennis Kling, Wayne McClelland, Michael McDonald, Orie Perry, William "Larry" Moran, William Chrysler and Darrin Burtch.

(d) Within 14 days from the date of the Board's Order, offer one of the inspector positions to Eric Hutchings.

(e) Make the following employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

> Greg Cole, Loran "Jim" Cowham, Eric Frie, Vernon Hayes, Lyle Hill, Shane Howard, Jerry Hurless, David Hurtado, Eric Hutchings, Stephen Jenks, Mark Jensen, Dennis Kling, Wayne McClelland, Michael McDonald, Orie Perry, William "Larry" Moran, William Chrysler and Darrin Burtch.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful actions against them, and within 3 days thereafter notify the employees in writing that this has been done and that the actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its Hastings, Michigan facility copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2004.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 30, 2005.

_____
Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge, lay-off, or otherwise discriminate against any of you for supporting the International Association of Machinists and Aerospace Workers (IAM) or any other union.

WE WILL NOT unilaterally make changes in the terms or conditions of your employment without providing the Union adequate notice and an opportunity to bargain over any proposed changes.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit comprised of all full-time and part time manufacturing, assembly and maintenance employees at our Hastings, Michigan facility.

WE WILL, within 14 days from the date of this Order, offer the following full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Greg Cole, Loran “Jim” Cowham, Eric Frie, Vernon Hayes, Lyle Hill, Shane Howard, Jerry Hurless, David Hurtado, Eric Hutchings, Stephen Jenks, Mark Jensen, Dennis Kling, Wayne McClelland, Michael McDonald, Orie Perry, William “Larry” Moran, William Chrysler and Darrin Burtch.

WE WILL, within 14 days from the date of this Order, offer a quality inspectors position to Eric Hutchings, or if those jobs no longer exist, a substantially equivalent position, without prejudice to his seniority or any other rights or privileges.

WE WILL make the above-named employees whole for any loss of earnings and other benefits resulting from their discharge or other discrimination, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful lay-off, and WE WILL, within 3 days thereafter, notify each of the above-mentioned employees in writing that this has been done and that the lay-offs will not be used against them in any way.

BLISS CLEARING NIAGARA, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300

Detroit, Michigan 48226-2569

Hours: 8:15 a.m. to 4:45 p.m.

313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.